

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION**

**CARDELL TOLIVER, IN HIS
REPRESENTATIVE CAPACITY AS
GUARDIAN OF CORNELIUS TOLIVER**

PLAINTIFF

VERSUS

CIVIL ACTION NO. 4:03CV11-P-B

**NATIONAL HERITAGE REALTY, INC., d/b/a
GREENWOOD HEALTH AND REHABILITATION
CENTER; AND JOHN AND JANE DOES 1-10**

DEFENDANTS

ORDER

This cause is before the Court on the defendants' Motion for Summary Judgment [136-1].

The Court, having reviewed the motion, the response, the briefs of the parties, the authorities cited and being otherwise fully advised in the premises, finds as follows, to-wit:

That the motion is not well-taken and should be denied. Defendants are correct in their assertion that Toliver filed the instant lawsuit as the decedent's guardian, a representative capacity never endorsed by the authority of the Chancery Court of Leflore County. However, Toliver's father died before Toliver could proceed to a hearing on the petition. Furthermore, Toliver is a proper party to bring the lawsuit—whether as a son seeking redress for the wrongful death of his father or in his most recent capacity as the personal representative of his father's estate—as recognized by the Chancery Court of Leflore County pursuant to a July 18, 2005 Order Opening Estate and Granting Letters of Administration. This fact alone sufficiently distinguishes the instant case from that of Austin v. Mariner Health Care, Inc., 3:03CV82 (N.D. Miss. 2005).

All that need be accomplished is an amendment to the caption of the case reflecting Toliver's

status as personal representative of the estate. To do so will work no prejudice on the defendants; by contrast, any other action would constitute a manifest injustice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendants' Motion for Summary Judgment [136-1] is not well-taken and should be, and hereby is, DENIED. IT IS FURTHER ORDERED that the plaintiff is to file a motion seeking to amend his complaint to reflect his capacity as personal representative of the estate of Cardell Toliver within ten (10) days of the entry of this Order.

SO ORDERED, this the 9th day of September, 2005.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES DISTRICT JUDGE